UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal Docket No.
	:	3:05 CR 40 (CFD)
SHEMAR BERRY	:	

RULING ON DEFENDANT'S MOTION TO SUPPRESS

Shemar Berry has been charged by a grand jury indictment with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The indictment alleges that Berry, who has previous criminal convictions on Connecticut state charges of sales of narcotics, larceny, assault, and weapons possession, was arrested by New Haven city police officers on November 21, 2004. At that time, the arresting officer claimed that Berry had brandished a Smith & Wesson Model 669 nine-millimeter handgun.[1]

By motion dated June 20, 2005, Berry moved to suppress the black jacket, hat, latex gloves, and related evidence seized from him during his November 2004 arrest as the products of an unlawful entry, search and arrest in violation of his Fourth Amendment rights. The Government argues that Berry was subject to a warrantless arrest, but one for which the police possessed probable cause and which did not violate the Fourth Amendment due to the surrounding "exigent circumstances." See, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971).

The court held an evidentiary hearing on the motion on August 29, 2005. Following are

[1] According to the arresting officer, Berry had dropped the gun in his attempt to flee the police; the handgun therefore was recovered shortly before Berry's arrest.

the Court's findings of fact and conclusions of law.

I. Findings of Fact

At approximately 10:20 p.m. on November 21, 2004, New Haven police officers Matt Deleo and Renee Forte were patrolling the Newhallville neighborhood in their marked police cruiser. Newhallville is considered one of New Haven's "hot spots" for narcotics and other criminal activity. Upon reaching the corner of Dixwell Avenue and Willis Street, Deleo and Forte saw two men blocking the busy sidewalk by sitting astride their bicycles. The two officers then pulled up to the curb, intending to ask the men to clear the sidewalk. As Officer Deleo began to exit the police car, one of the men pedaled away at high speed on a pink child-sized bicycle with a banana seat. Deleo observed the man to be wearing a black satin jacket and black hat.

Deleo chased the man on foot, pulling close to him as the two were on Bassett Street in Newhallville; as Deleo approached, the man turned around while still pedaling the bicycle and brandished a gun at him. Officer Deleo fell to the ground to protect himself as the man dropped the gun and pedaled off. Deleo then recovered the gun, a Smith & Wesson Model 669 nine-millimeter handgun loaded with 12 rounds of ammunition. At this point, Officer Forte (who had been following in the police cruiser) picked up Deleo. The two officers stored the gun in their cruiser's glove compartment and continued driving through Newhallville in search of the cyclist. Officer Deleo also put out a call over the police radio asking for assistance in locating a suspect he described as a "black male, five-ten, heavy-set, last seen on a bicycle down Sherman [Avenue]." Approximately a minute and a half after placing that radio dispatch, Officers Deleo and Forte saw a man matching their suspect's description outside a two-family home at 486

Dixwell Avenue.[2] Both officers recognized the man as the same person who earlier had biked away from them at the corner of Dixwell Avenue and Willis Street.

Officer Deleo got out of the police cruiser, began to approach the suspect, and ordered him to stop, but the man instead ran inside the left entrance door of the house.[3] Officer Forte parked the police car, placed a radio call for backup assistance, and went to guard the rear door to the building. Both officers felt that the suspect was potentially still armed and dangerous, and that there might have been a hostage situation inside the house.[4] Two more officers responded to the backup call and joined Officer Deleo at the front entrance to 486 Dixwell; the three officers knocked, announced their presence, and immediately and forcibly entered through the door. In the first room of the apartment, the officers saw the suspect sitting in bed. The man had a blanket pulled over his legs, but was wearing shoes and the black hat Officer Deleo had observed earlier. When the police apprehended him, the man was in the process of removing the black satin jacket he had on. The suspect was sweating and appeared out of breath.

Deleo handcuffed and arrested the man, who was later identified as Shemar Berry.

---

[2] The officers' recollections of how they observed the man outside of 486 Dixwell vary a bit. Officer Forte testified at the Court's hearing that she saw the suspect seated on the pink bicycle facing the street but within the fence of the home's front yard. Forte did not see where he then went because, as Deleo approached the man, she secured the police cruiser and then went to guard the back of the house. Officer Deleo indicated over the police radio that he saw the man leaving 486 Dixwell; at the Court's hearing, Deleo elaborated that he first saw the man pedaling his bike from the house, but that he ran into the house when Deleo told him to stop. The officers' observations match in two key respects, however; both agree that they saw the man outside the building in question, and recognized him as the same man whom Deleo had chased.

[3] 486 Dixwell, as previously stated, is a two-family home with two separate entrances. The left entrance leads only to the first-floor apartment.

[4] Officers Forte and Deleo did not know whether Berry resided at the Dixwell Avenue address or knew anyone living there.

Contemporaneous with the arrest, Berry's bicycle, hat, jacket, and the jacket's contents (a pair of latex gloves, a cigarette lighter, and some paperwork from the Connecticut Department of Correction) were seized as evidence.[5]

II. Conclusions of Law

As a general rule, a criminal defendant who seeks to suppress evidence bears the burden of proof. See United States v. Galante, 547 F.2d 733, 738 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977). A defendant seeking to suppress evidence based on a search or seizure must first establish standing, i.e., an expectation of privacy, by a preponderance of the evidence. See U.S. v. Osorio, 949 F.2d 38, 40 (2d Cir. 1991). Berry has presented evidence that he was a frequent social and occasional overnight guest of the family living at 486 Dixwell Avenue. One's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." Minnesota v. Olson, 495 U.S. 91, 96-97 (1990). Therefore, Berry has standing to challenge this search.

Having satisfied the standing requirement, the defendant next must establish a basis for his motion to suppress, such as an initial showing that the search was conducted without a warrant. The burden of proof then shifts to the Government to show that the warrantless search falls within one of the recognized exceptions to the warrant requirement. See United States v. Sacco, 563 F.2d 552, 558 (2d Cir. 1977), cert. denied, 434 U.S. 1039 (1977). It is undisputed that the search here was a warrantless one. The Court concludes, however, that the Government

[5] The entire pursuit and arrest lasted approximately four minutes, as the radio dispatcher at New Haven police headquarters assigned a case number to the arrest and signed off at 10:24 p.m. Berry initially was charged with a variety of state felonies and misdemeanors, including weapons violations; reckless endangerment; interfering with police; and disorderly conduct.

has met its burden and demonstrated sufficient basis to conduct a warrantless search and arrest of Berry.

The Supreme Court has held that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972). In Payton v. New York, 445 U.S. 573 (1980), the Court applied the "basic principle[s]" of Fourth Amendment law and found that "searches and seizures inside a home without a warrant are presumptively unreasonable." Id. at 586. If, however, the Government can demonstrate sufficient "exigent circumstances that overcome the presumption of unreasonableness," a warrantless home arrest is permissible. Welsh v. Wisconsin, 466 U.S. 740, 750 (1984) (citing Payton, 445 U.S. at 586).

The Supreme Court has recognized several emergency situations that meet the exigent circumstances exception, including when officers are in hot pursuit of a fleeing felon. See, e.g., United States v. Santana, 427 U.S. 38, 42-43 (1976); Warden v. Hayden, 387 U.S. 294, 298-99 (1967). As the Warden Court wrote, "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." Id. The initial application of the exigent circumstances exception is decided by lower courts, although the Second Circuit has provided a list of factors to consider:

> These include (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect "is reasonably believed to be armed"; (3) "a clear showing of probable cause . . . to believe that the suspect committed the crime"; (4) "strong reason to believe that the suspect is in the premises being entered"; (5) "a likelihood that the suspect will escape if not swiftly apprehended"; and (6) the peaceful circumstances of the entry.

United States v. Martinez-Gonzalez, 686 F.2d 93, 100 (2d Cir. 1982) (quoting United States v.

Reed, 572 F.2d 412, 424 (2d Cir. 1978), cert. denied, 439 U.S. 913 (1978)). "The presence or absence of any one factor is not conclusive," as long as the lower court finds that the police confronted an "urgent need" justifying warrantless entry to the home.[6] United States v. Crespo, 834 F.2d 267, 270 (2d Cir. 1987). Police officers also "may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance." Tierney v. Davidson, 133 F.3d 189, 196 (2d Cir. 1998) (quoting Root v. Gauper, 438 U.S. 361, 364 (8th Cir. 1971)); see also Keeney v. City of New London, 196 F. Supp. 2d 190, 196-97 (D. Conn. 2002) (applying Tierney standard).[7]

---

[6] Berry argues that the authority governing the New Haven police at that time was the Connecticut Supreme Court's opinion in State v. Guertin, 190 Conn. 440, 461 A.2d 963 (1983), which he claims stands for the proposition that exigent circumstances can not exist when the police are making an arrest for a misdemeanor. The Guertin opinion actually holds that "to justify an arrest it must appear that the arresting officer had reasonable grounds to believe that a felony had been committed." Id. at 446. The Guertin Court went on to adopt a test for exigent circumstances first adopted by the Supreme Court of Appeals of West Virginia: "whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest were not made, the accused would be able to destroy evidence, flee or . . . endanger the safety or property of others." Id. at 453 (quoting State v. Canby, 252 S.E.2d 164, 167 (W. Va. 1979)).

This Court notes that the United States Supreme Court has never adopted a bright-line rule stating that exigent circumstances only exist in felony cases. Further, even applying Guertin, exigent circumstances existed here: the police had reasonable grounds to believe that a felony had been committed (the brandishing of a loaded weapon at Officer Deleo) and to believe that if an immediate arrest were not made, the safety or property of those residing at 486 Dixwell could be endangered.

[7] The defendant also argues that the officers' conduct was not consistent with a belief that exigent circumstances existed, since they knocked and announced their presence before forcibly entering through the front door. It is undisputed, though, that the officers' announcement was immediately followed by their entrance. This is insufficient under normal circumstances to meet the common law knock-and-announce requirement, later codified for federal officers at 18 U.S.C. § 3109. See, e.g., United States v. Banks, 540 U.S. 31, 43 (2003) ("Absent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one."). When the police confront exigent circumstances, however, the knock-and-announce requirement is suspended. See id. ("[W]here the officers knocked and announced their presence, and forcibly

Applying Martinez-Gonzalez and Tierney to the instant facts, the Court concludes that exigent circumstances existed which justified the officers' entry to 486 Dixwell Avenue. Berry was first discovered in a high-crime area late at night when he fled from police at high speed and then pointed a loaded handgun at the pursuing officer. Approximately four minutes into their pursuit, Officers Deleo and Forte observed Berry outside the Dixwell Avenue residence and immediately recognized him as their suspect. See, e.g, Warden v. Hayden, 387 U.S. at 298 ("[T]he suspect had entered 2111 Cocoa Lane less than five minutes before they reached it. [The police] acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used . . . or might use against them.")

Berry also saw the police officers approach the house, and he then fled inside to avoid them. Compare Santana, 427 U.S. at 43 ("Once Santana saw the police, there was . . . a realistic expectation that any delay [in executing a search] would result in destruction of evidence.") The officers already knew that Berry had willfully brandished a loaded firearm; it was reasonable for them to believe that he might possess additional weapons and that persons inside the house could be in immediate danger. As in previous exigent circumstances cases, "speed here was essential." Warden v. Hayden, 387 U.S. at 299. The warrantless search was necessary to insure that other residents of the house were not injured and "that the police had control of all weapons which could be used against them or to effect an escape." Id. Therefore, Berry's subsequent arrest and

---

entered after a reasonable suspicion of exigency had ripened, their entry satisfied . . . the Fourth Amendment, even without refusal of admittance.") The Court finds that the officers' conduct was consistent with that of reasonable police officers confronting exigent circumstances. Given the Court's determination that such exigency existed, the forcible entry neither violated the Fourth Amendment nor supports a conclusion that the officers thought they needed a warrant for entry.

the seizure of his personal items in a search incident to that arrest were lawful.[8]

III. Conclusion

For the above reasons, the Court finds that the warrantless search of 486 Dixwell Avenue, the subsequent arrest of Shemar Berry, and the seizure of related evidence did not violate Berry's Fourth Amendment rights. The Defendant's Motion to Suppress [Doc. #20] is DENIED.

So ordered this _2nd_ day of March 2006 at Hartford, Connecticut.

_/s/ CFD_____
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

[8] The Government has argued that the seizure of Berry's personal items alternatively could be justified under the "plain view" doctrine. See, e.g., Horton v. California, 496 U.S. 120 (1990). The Court does not uphold the seizure under that theory, but only as the products of a search and seizure incident to a lawful arrest. See Chimel v. California, 395 U.S. 752, 762-63 (1969) ("When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape . . . [and] for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.")